



Know Your Indemnity Obligation
Know Your Risk
Know Your Insurance Company

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Roadmap

- Key Points to Take From This Presentation:
 - Type I, Type II & Type III indemnity
 - How to identify the different types of indemnity
 - How to modify an indemnity provision
 - What is your obligation to defend and when does it arise

Indemnity Defined

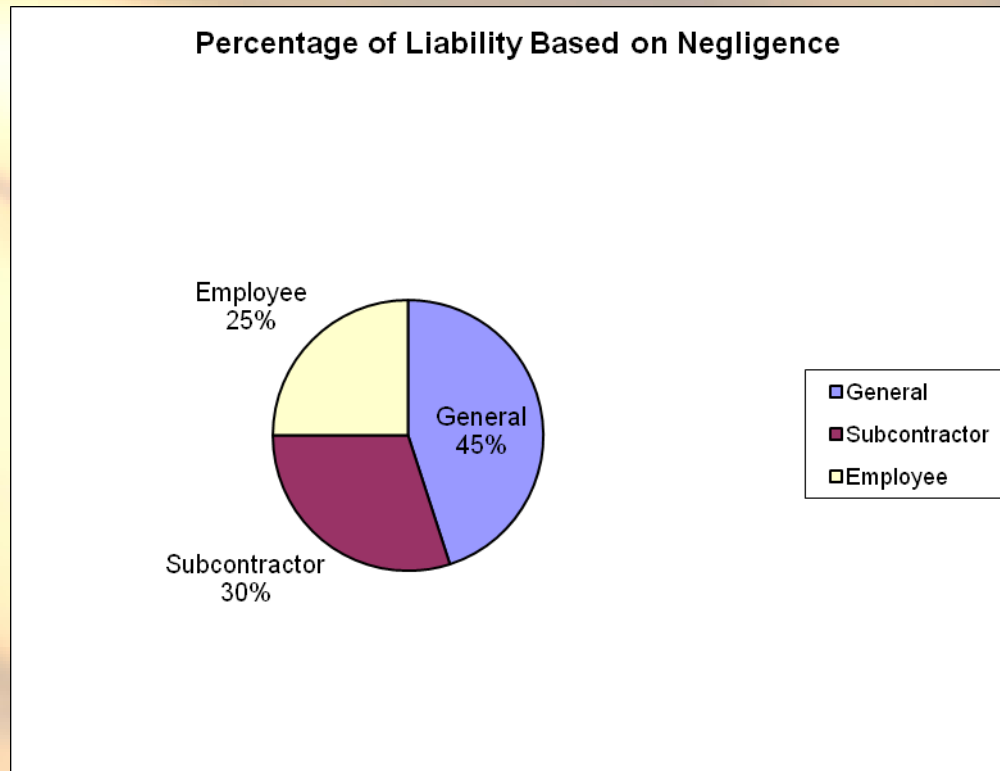
- Indemnity is the obligation resting on one party (Indemnitor) to make good a loss or damage incurred by another party (Indemnitee).
- The duty to indemnify can arise from:
 - Express Contract Provision
 - Implied Contract Provision
 - Equity (the doctrine of fairness)

General Rule

- As a General Rule, each party is liable for its own negligent conduct
- Indemnity Provisions in Contracts shift liability to another party

Fact Pattern

- Subcontractor cut a hole in metal decking & did not cover.
- General Contractor was aware of hole and had another subcontractor cover it.
- Plywood over hole was not secured.
- Carpenter picked up plywood and walked forward w/out looking.
- Carpenter fell through the hole and was killed.
- General Contractor & Subcontractor were sued for wrongful death of Carpenter



The Court found the General Contractor, Subcontractor & Carpenter were all negligent and apportioned fault as indicated above.

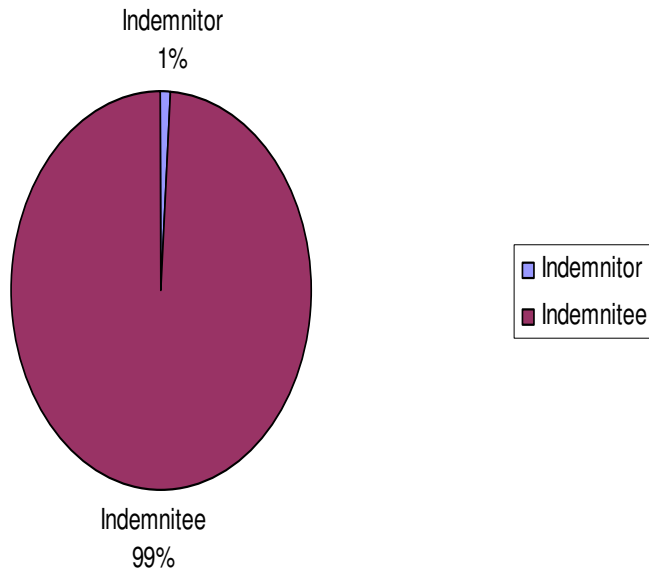
Types of Indemnity Clauses

- There are 3 types of indemnity provisions you may come across in reviewing your contracts
- It is important to understand what type of indemnity provision you have and the obligations that arise under Type I, Type II and Type III
 - This way you will be better prepared to make the decision as to which type works better for you
- The final determination as to which Type of provision you have will ultimately turn on the particular language of the Contract, the intent of the parties, the facts of the case and the determination of the Court

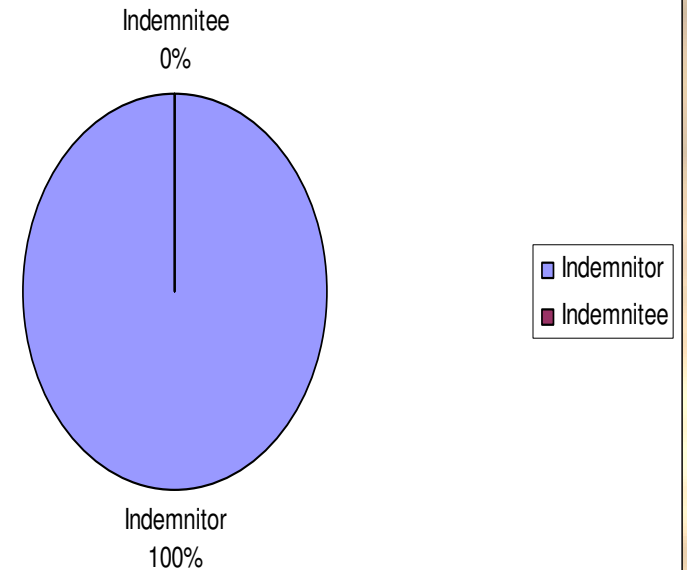
Type I

- This type of indemnification provision provides:
 - “Expressly and unequivocally” that the Indemnitor is to *indemnify* the Indemnitee for the negligence of the Indemnitee, even if the Indemnitee’s liability arises from its *active* or *passive* negligence
- Therefore, as long as the Indemnitee is not solely negligent and its misconduct is not willful, the Indemnitor has a duty to indemnify all of the Indemnitee’s negligent conduct

Percentage of Negligence

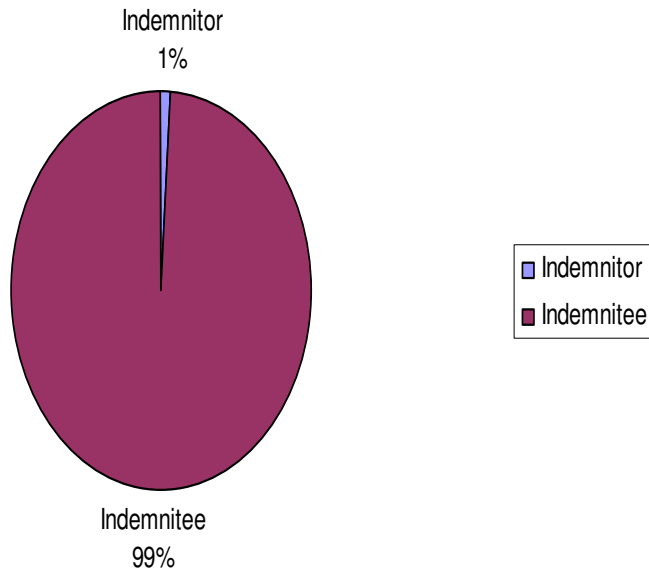


Type I Liability for Indemnitor

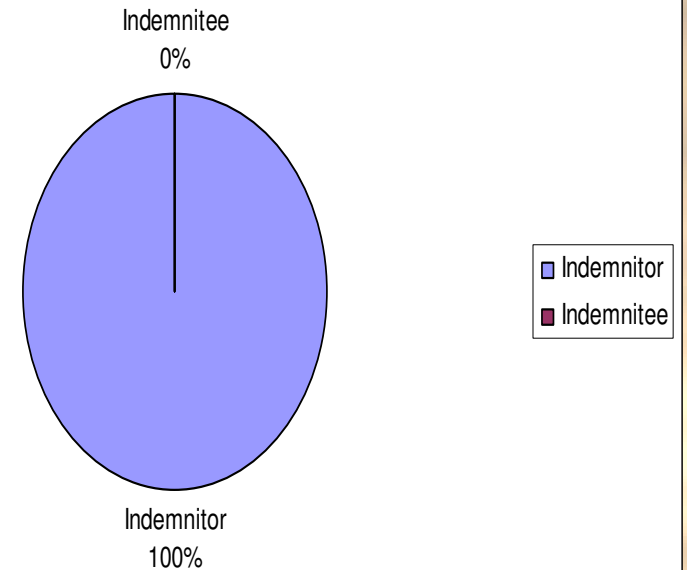


As illustrated above, under a Type I Indemnity Provision, the Indemnatee could be 99% passive or actively negligent and the Indemnitor will still be obligated to indemnify the Indemnatee 100%

Percentage of Negligence



Type I Liability for Indemnitor



If your Contract has you give a Type I indemnity, you will be liable for 100% of the damages even if you are only 1% at fault

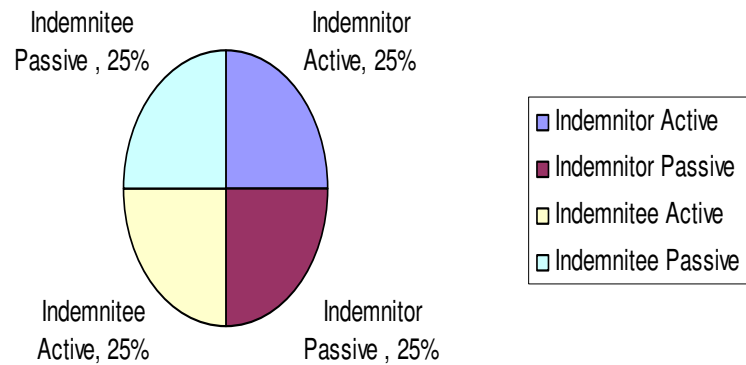
Example of Type I

- **AGC Subcontract**
- **11.1 General Indemnity** –
 - All work covered by the Subcontract done at the site of construction or in preparing or delivering materials or equipment, or any or all of them, to or from the site shall be at the risk of Subcontractor exclusively. To the fullest extent permitted by law, ***Subcontractor shall***, with respect to all work which is covered by or incidental to the Subcontract, ***indemnify***, hold harmless and defend Contractor from and against any and all allegations, losses, claims, actions, demands, damages, liabilities, or expenses (including costs, expenses and attorneys' fees), arising from or relating to the death or bodily injury to persons, injury to property, design defects (if design originated by Subcontractor), or other loss, damage or expense. ***Subcontractor's duty to indemnify shall include all damages caused or alleged to be caused in whole or in part by any negligent act or omission, whether active or passive, of:*** (a) Subcontractor; (b) anyone directly or indirectly employed by Subcontractor; (c) anyone for whose acts Subcontractor may be liable; or (d) ***Contractor. Subcontractor shall not be obligated to indemnify Contractor with respect to the sole negligence or willful misconduct of Contractor***, its agents, servants or subcontractors who are directly responsible to Contractor, excluding Subcontractor
- This provision indicates that as long as the Indemnitee is not solely negligent or its misconduct was willful, the Indemnitor is obligated to indemnify the Indemnitee even if the Indemnitee is active or passively negligent

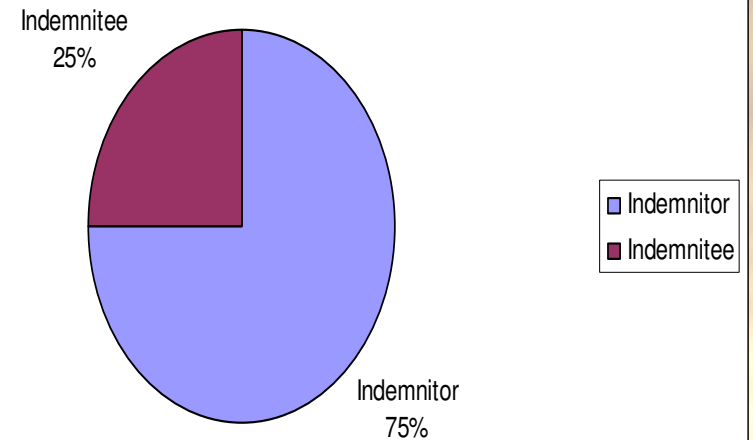
Type II

- This type of indemnification provision provides:
 - The Indemnitor is to *indemnify* the Indemnitee for the negligence of the Indemnitee, be it sole or contributory, but only if the Indemnitee's liability arises from its *passive* negligence as opposed to active negligence
- Therefore, if the Indemnitee was actively negligent, the indemnity provision will not apply and the liability will be apportioned according to percentage of fault

Negligence Percentage



Type II Liability for Indemnitor



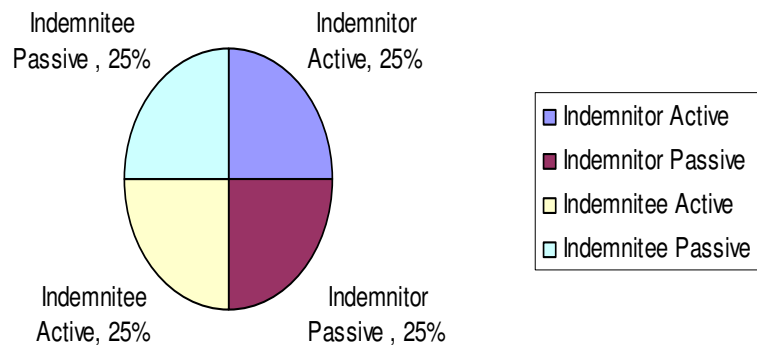
As illustrated above, under a Type II Indemnity Provision, the Indemnitor is obligated to indemnify the Indemnitor for all its own negligent conduct and the passive negligent conduct of the Indemnitor

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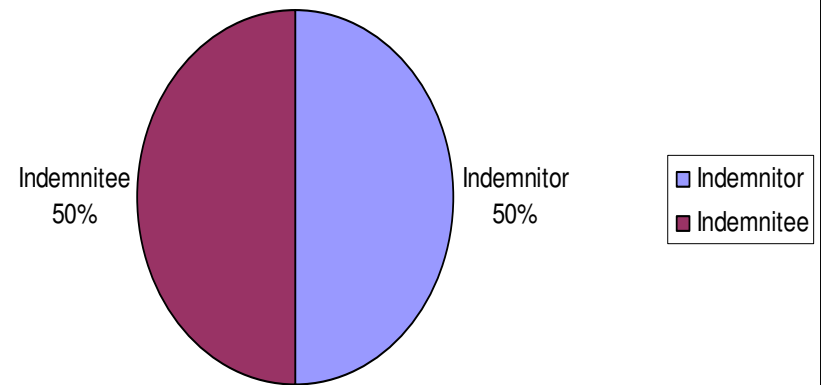
Type III

- This type of indemnification provision provides:
 - The Indemnitor is to indemnify the Indemnitee for the Indemnitor's own negligence; however, the Indemnitor has *no duty* to indemnify the Indemnitee if the Indemnitee was in any way negligent, either *active or passive*, regardless of whether the Indemnitor was also negligent
- Therefore, the Indemnitee will be solely liable for any of its own negligent conduct

Negligence Percentage



Type III Liability for Indemnitor



As illustrated above, under a Type III Indemnity Provision, the Indemnitor is not obligated to indemnify the Indemnitee for any of its passive or active negligent conduct, only for the Indemnitor's own conduct

Example of Type III

- **AIA Contract Document A107 – 2007**
- **§ 9.15 INDEMNIFICATION**
 - **§ 9.15.1** To the fullest extent permitted by law, the *Contractor shall indemnify* and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), *but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable*, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 9.15.1
- This provision indicates that an Indemnitor is only liable for its own negligent conduct. Therefore, any negligent conduct of the Indemnitee, whether passive or active, is not indemnified

General Indemnity

- When a Contract Indemnity Provision is silent as to the issue of the Indemnitee's negligence it will be construed to be a General Indemnity Clause
- As a General Rule, a General Indemnity Clause is treated as a Type II Indemnity Provision
 - Therefore, the Indemnitee is not entitled to indemnity for its active negligence, only passive, unless the circumstances of the case and language of a contract evidence a different intent by the parties.

Example of General Provision

- **DBIA Standard Form of Agreement Between Design-Builder and Subcontractor**
- **11.4 Subcontractor's General Indemnification**
 - Subcontractor, to the fullest extent permitted by law, shall indemnify, hold harmless and defend Owner, Design-Builder, their officers, directors, employees and agents from and against claims, losses, damages, and liabilities, including attorneys' fees and expenses, for bodily injury, sickness or death, and property damage or destruction (other than to the Work itself) *to the extent resulting from the negligent acts or omissions of Subcontractor, Sub-Subcontractors, anyone employed directly or indirectly by any of them or anyone for whose acts any of them may be liable.*
- Again, this provision limits liability to the negligent acts of the Indemnitor only

Duty to Defend

- Most contractual indemnity provisions include a duty to defend.
- 2008 California Supreme Court decisions (Crawford v. Weather Shield) held that a subcontractor's contractual duty to defend existed regardless of subcontractor's negligence
- Court found contract language imposed two duties (defense & indemnity) and held duty to defend arises immediately upon tender of defense regardless of amount of negligence.
- Subcontractor had to pay cost of defense even though not negligent.

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Lessons from Crawford:

- When claims arise, immediately consult with your attorney to evaluate your contract to determine your rights & obligations relative to indemnity and defense.
- If you have the right to indemnity/defense from someone then tender the obligation in writing.
- If someone tenders to you, immediately contact your attorney & insurance carriers.

How to Modify an Indemnity Provision

- To convert to a Type III proportional liability/indemnity provision add the following phrase in front of the words ‘defend’ and/or ‘indemnify’ each place they occur in your contracts:
 - “to the extent, and only to the extent, it is determined to be responsible [insert your name] shall”

Conclusion

- These are just the general rules regarding Indemnity Provisions, however, they are not conclusive and if not expressly stated in the contract, when deciding which type applies and who is indemnified it ultimately depends on the particular language of the Contract, the intent of the parties, and the facts of the case.
- Depending on whether you are the Indemnitee, the Indemnitor or both, the type of provision which best fits you will vary.
- It is important to read the provision thoroughly and carefully in order to ensure you are not placing yourself at a higher risk of liability.
- Be aware, as the Indemnitor, Type I is the most onerous and Type III the least.

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